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In the United States Circuit Court  
of Appeals for the Ninth Circuit ?

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A. E. ANDERSON,  
*Plaintiff in Error,*  
vs.  
THAD B. PRESTON,  
*Defendant in Error.*

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No. 4484

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Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE WEST-  
ERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

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STATEMENT

Appellant is complaining of a judgment entered in the court below after sustaining a general demurrer to his amended complaint dismissing appellant's cause of action and for costs. The facts stated in the amended complain are in substance:

That Mr. Preston owned about 58 forties of timber land in Kitsap and Pierce Counties in the State of Washington, being in township 22,-1 West with a stumpage of about 61,866,000 feet. Mr. Preston

lives in Ionia, Michigan, and Mr. Anderson is engaged in the sale of timber and timber lands in the State of Washington for owners as a broker. In January, 1923, having some customers who wanted timber lands, he wrote to Preston to ascertain whether or not he still owned certain timber lands on Hoods' Canal, not described in the complaint, which Anderson and Preston had had some correspondence about sometime before. Preston wrote back to the effect that he had a tract in Township 22-1 West that he thought was very desirable timber and quoted the price to Anderson at \$3.00 per thousand and if Anderson would be at all interested to kindly let him know.

Anderson was interested because he had buyers for large timber tracts and he wrote back to Preston for a description of his lands in 22-1, township plat or section plat with parcels marked off so there would be no mistake in the description, and on receipt of this plat would put it up to his parties who were anxious for a logging chance. In this same letter he asked Preston his price and suggested also that he, Anderson, should be paid a commission. (Rec. 5). Preston replied enclosing a plat of Township 22-1 as the basis of his purchase of the lands and in that letter also stated that on the sale of the lands at \$3.00 per thousand there would be a five per cent commission going to Anderson and terms could be made that would meet the views of a sub-

stantial purchaser. The plat enclosed is Exhibit "A" to the amended complaint and is found on page 10 of the record with a minute detail with the stumpage on the several forty acre tracts aggregating 61,866,000 feet. Under this written employment Anderson proceeded as Preston's agent and broker to sell and to find purchasers of his timber tracts at \$3.00 per thousand, and on the 16th day of June, 1923, obtained and procured substantial purchasers, McFaddon, Sams and Peters, mill operators and dealers in timber and timber lands, and brought the said intending purchasers to the defendant who at that time was represented by one W. J. Patterson of Aberdeen, Washington, as the agent of the defendant, with authority to make the sale and treat with the said intending purchasers. That thereupon the said purchasers proceeded to cruise all of said lands, and on or about the 1st day of November, 1923, Preston refused to proceed with and consummate the said sale and for the first time known to the plaintiff or to the intending purchasers informed the intending purchasers and Anderson that he, Preston, did not own all the said timber lands but only owned a small portion of it and for that reason Preston could not consummate the sale and convey the timber lands to the intending purchasers.

Anderson asks judgment against Preston for five per cent of the quoted value of the timber with in-

terest thereon at the rate of six per cent per annum from the 1st day of November, 1923.

The letters, material to the contract and which made up the written contract with Anderson, are quoted in full in the amended complaint at Rec. page 5, 6 and 10. From these letters we have the parties, Anderson, the broker, and Preston, the owner. We have the employment of Anderson by Preston to sell his timber at the rate of \$3.00 per thousand, on such terms as would meet a substantial purchaser. We have the description of the real estate complete within itself with a complete description and the amount of stumpage on the defendant's forties with a total stumpage of 61,866,000 feet. We have the agreement to pay the commission or compensation at five per cent of the value of the timber at \$3.00 per thousand.

## POINTS AND AUTHORITIES

### STATUTE OF FRAUDS:

The contract of employment of a real estate broker authorizing and employing him to sell or purchase real estate for compensation or a commission is void unless such agreement, contract or promise or some note or memorandum thereof be in writing and signed by the party employing or some one duly authorized by him to sign the note or memorandum.

Sec. 5825, Rem. Com. Statutes of Wash., which reads as follows:

Sec. 5825—"In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

#### STANDING TIMBER

Standing timber is real estate and the employment of an agent to sell standing and growing timber must be in writing and falls under provisions of this section.

*Engleson vs. Port Crescent Shingle Co.*, 74 Wash. 424.

In this case an oral engagement was made with the plaintiff to sell timber in Clallam County. There were a few letters passed, but no provision made for the payment of a commission; and no description of property which are two elements necessary, involved in a contract of this kind. Citing:

*Kieth vs. Smith*, 46 Wash. 131;  
*Foote vs. Robbins*, 50 Wash. 277;  
*Forland vs. Boyum*, 53 Wash. 421;  
*Krouch vs. Forbes*, 63 Wash. 564.

#### ESSENTIAL ELEMENTS

The writing, to satisfy the statute, must express

the entire contract and leave nothing that pertains to the essentials of the contract to be supplied by parole.

*Engleson Case*, 74 Wash. 424 and cases cited: *Cushing vs. Monarch Timber Co.*, 75 Wash. 678, a leading case where plaintiff undertakes to collect a commission for the sale of timber and timber lands, logging roads, etc.

Essential elements are:

(1) The Parties; (2) The Employment; (3) The Description of Real Estate; (4) The Agreement to Pay Commission or Compensation; the description must be complete within itself by which the realty to be sold can be known and identified.

The court said: "Parole evidence may be resorted to for the purpose of applying the description contained in a writing, to a definite piece of property and to ascertain its location on the ground but never for the purpose of applying deficiencies in a description, otherwise, so incomplete as to definitely describe any land. The description must be in itself capable of application to something definite, before parole testimony can be admitted to identify any property as the thing described."

Description by official government survey using recognized abbreviations as S. 1/2 of S. E. 27-11-19 is sufficient within the statute requiring a contract to be in writing.



*Schmidt vs. Powell*, 107 Wash. 53.

This case also follows the universal rule. The courts take judicial notice of the manner of survey, location of base, meridian lines, which are located by virtue of Acts of Congress and all the other elements in the location of sections, parts of sections, townships, ranges, etc., quoting

*Carson vs. Railsback*, 3 W. T. 168;  
*In Re Wenatchee Reclamation District*, 91 Wash. 60.

As said in the Schmidt case referring to our plat accompanying the letter, "we have the description contained in the instrument accompanied by the recognition of those facts which the Court is bound to know, rendering the description full, adequate and complete. Where descriptions have been held insufficient, it has been necessary in order to determine the location of the property to add to the words and figures contained in the description information, which could only come through parole testimony, but in none of these cases (citing a long line of Wash. cases) was involved the question of whether a description, apparently insufficient, may be rendered sufficient when interpreted by the facts of which the Courts will take judicial notice.

Is the township plat and memorandum with parcels marked off and the amount of stumpage on the several parcels, a part of the original contract?

It is our contention that the intention of the parties and the reference to the same by the letters was to make the section plat and memorandum that part of the contract giving the description of the land and the stumpage upon the same necessary for the carrying out of the employment of Mr. Anderson by Mr. Preston. Mr. Anderson writes in his letter of Jan. 1st: "In regard to the tract in 22-1 West, if you will give me the minutes of same (township plat or section plat with parcels marked off) so that there would be no mistake made in descriptions, I will put it up to this party as he is anxious for a logging chance." In answer to this letter Mr. Preston wrote, Jan. 25th: "I am enclosing plat of lands in 22-1 and that was the basis of our purchase of these lands," meaning, of course, that the township plat with parcels marked off and the stumpage on the different parcels constituted descriptions and quantity of stumpage and is all necessary for the performance of the employment by Mr. Anderson. In other words, reading all the writing together as one, we have a contract of employment in writing answering all the elements of the statute of frauds. The township plat was requested by Anderson and sent by Preston and accepted by Anderson as part of the contract of employment. There is no condition as we find in some cases but was part of the natural necessary proceeding in the case of employment. While technically there are two instruments, but as a matter of law there is but one and it is the

law, that a reference in a contract or paper to another instrument or paper that contains a description of the property justified the examination of two instruments together for the purpose of identifying the particular property referred to.

*Krouch vs. Forbes*, 63 Wash. 564;  
*Gillman vs. Brunton*, 94 Wash. 1;  
*Nance vs. Valentine*, 99 Wash. 323.

#### LETTERS, WRITING, ETC., CONSTITUTE ONE PAPER

The Supreme Court of the U. S. said, "It is well established that a complete contract, binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract and all connected with each other, that they may be fairly said to constitute one paper relating to the contract."

*Ryan vs. U. S.*, 10 Sup. Ct. R. 913.

In this case the description of the land was by the usual abbreviation or fractional parts of sections and the contracts were made up wholly from letters and telegrams. See also

*McCartney vs. Clover Valley Land & Stock Company*, 232 Fed. 697, 8th Cir. 1st A. L. R. 1130.

This is an action by the plaintiff to recover a commission as real estate broker for the sale of the company's ranch. It was conceded that the Statute of

Frauds of California governed, which is almost identical with our statute. The company's headquarters was in Utah, the broker lived in Los Angeles. The contract of employment was made up entirely of letters. The plaintiff's case was dismissed mainly on the ground that no contract or note or memorandum thereof was made in writing subscribed by defendant, etc., employing the plaintiff as broker. The Cir. Court of Appeals held, reversing the District Court:

"The correspondence is an ample note or memorandum of the contract employing plaintiff to satisfy the California Code. It has been the uniform holding of the courts of that State that this statute does not require any formal contract. The "writing" which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged or by his agent." Citing a number of California cases. "These decisions are in accord with the general rule on the subject in this country and England."

From these letters we have the written memorandum contract or agreement of Preston, authorizing and employing Anderson as agent or broker to sell real estate for a commission, as follows:

This is to certify that I have this 25th day of January, 1923, employed and authorized A. E. Anderson, of Tacoma, Washington, to sell timber lands

in Township Twenty-two North, Range One West, W. M., in Mason and Pierce Counties, Washington, being 58½ forty acre tracts marked off on the township plat hereto attached and referred to as a definite description, the said timber lands containing about 61,866,000 feet of timber; the sale of said lands to be at \$3.00 per thousand; on terms that would meet the views of substantial purchasers. The said Anderson to receive on the sale of said timber lands a 5% commission.

(Signed) T. B. PRESTON,  
Ionia, Mich.

(Township plat giving definite description being same as on Record page 10, which we wish read into this contract without printing in this brief).

#### WHEN BROKER EARNS COMMISSION

The broker was entitled to his commission although the sale was defeated through the act of the owner, or the owner chose to deal with the purchaser on other terms.

*Carsten vs. McReavy*, 1 Wash. 359;  
*Barnes vs. German Saving*, 21 Wash. 448;  
*Norman vs. Hopper*, 38 Wash. 415.

In the case of *Norris vs. Byrne*, 38 Wash. 592, the Court announced the general rule, quoting from the Carsten case:

“Courts almost unanimously unite in holding that in case of an ordinary employment to sell, once he has procured a party able and willing to buy, upon

the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended and he is entitled to his commission. It is not his duty to procure a contract or make one, and he is not in default if he fails to do either."

*McGinnis vs. Forest Lbr. Co.*, 123 Wash. 136.

McGinnis, a commission man, undertook to sell 17 carloads of lumber for the lumber company; he to be paid a commission as soon as the cars were shipped. McGinnis found purchasers for the lumber but the cars were not shipped. The Supreme Court held, "It is the settled law, that where the broker in good faith procures a purchaser, ready, able and willing to buy on the terms fixed by the seller and the seller fails to complete the contract, the broker is entitled to his commission." The fact that the cars were not shipped is no defense, as in that case "it would permit the company to take advantage of its own wrong."

*Dean vs. Williams*, 56 Wash. 614.

Dean was employed as an agent to sell certain property. He produced purchasers ready, willing and able to buy and the deal fell through because of the failure of the title of the owner and the failure of the sale was due to the owners not doing things they agreed to do, to-wit: Convey the land and furnish a good title which respondent had a

right to assume appellants could do at all times. The agent having performed all his work and the sale not being consummated through the fault of the owner, the agent was entitled to his commission.

See the long line of authorities cited and quoted from in this case.

Case Note in No. 3 L. N. S. 576 on this point says:

That it is the universal rule that the agent is entitled to his commission where the sale fell through because of lack of title or defective title in the principal.

*Goedfroy vs. Hupp*, 93 Wash. 371.

The broker in this case was entitled to his commission although only part of the property passed in the sale. See also for different phases:

*Grinnell Co. vs. Simpson*, 64 Wash. 564;  
*Carsten vs. House*, 96 Wash. 50;  
*Johnson vs. Dahlquist*, 124 Wash. 267.

#### OWNER LIABLE WHEN HE ASSUMES THE MANAGEMENT OF A SALE

Where the owner assumes the management of the sale to the purchasers furnished by the agent and either consummates the sale on terms of his own or fails to do so, through no fault of the agent, the agent has earned his commission.

*Duncan vs. Parker*, 81 W. 340, following

*Lawson vs. Black Diamond Coal Co.*, 53 Wash. 614, and other cases.

And where the sale was made of more land than listed or less than what was listed the commission is earned as to the land listed and the sale by the owner of more or of less of the property listed does not viciate the sale.

*Miller vs. Brown*, 15 W. D. 155;  
Following *Duncan vs. Parker*, 81 W. 340;  
L. R. A. 1915 A. 804;  
*Godefroy vs. Hupp*, 93 W. 371.

Where change of terms are made by owner and accepted by purchaser, he still is liable for commission.

*Lempke vs. Nordhy*, 117 Wash. 221.

With this contract of employment Anderson produces his intending purchasers ready, willing and able to buy, and with the description of the lands furnished by Preston proceeds to cruise before purchasing the timber lands in question.

Preston employs Mr. Patterson of Aberdeen as his representative to be on the ground with the intending purchasers to arrange and consummate the deal.

The cruise was made by the intending purchasers, conferences were had between them and Mr. Patterson from time to time, when finally on or about the



1st day of November, 1923, it appears that Preston could not give title to all of said lands and could give title to only 6 forties out of the 58½ forties, Anderson was employed to sell.

We submit that Anderson, as the legally employed agent has earned his commission. And our amended complaint states a complete cause of action.

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